IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6314

JAMES ROY GOSA,

Petitioner,

v.

J. A. MAYDEN, WARDEN,

Respondant.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, denying Petitioners application for a Writ of Habeas Corpus appears as *Gosa v. Mayden*, 450 F.2d. 753 (5th Cir.) 1971. (A. 35).

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on October 12, 1971. (A. 35). Pursuant to application for extension of time for filing Petition for Certiorari, and Order entered thereupon on January 6, 1972, Petition for Writ of Certiorari was filed on March 9, 1972, and was granted on June 19, 1972. The Jurisdiction of this Court was invoked under 28 USC §2101(c).

QUESTION PRESENTED

The sole issue presented is whether this Court's decision in *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed. 2d. 291 (1969) will be applied to comparable proceedings of military courts which reached a stage of complete finality prior to June 2, 1969.

STATEMENT OF THE CASE

On August 13, 1966, James Roy Gosa was a member of the United States Air Force, stationed at Warren Air Force Base, Cheyenne, Wyoming. Just prior to midnight, on the night in question, he was officially off-duty with the permission of his superior officers, had left the military post dressed in civilian clothing and allegedly raped a civilian in the City of Cheyenne, Wyoming. The alleged victim was not on any type of military duty and had no direct or indirect relationship with the military. Gosa was arrested by civil authorities and charged for forcible rape. Gosa was unable to make bond and was confined until preliminary hearings on September 23, 1966, when he was released upon failure of the complaining witness to appear. He was immediately taken

into military custody and charged with violation of Article 120, Uniform Code of Military Justice (U.C.M.J.) and 10 USCA § 920, which provides that any person subject to the Code who commits an act of rape may be punished as a Court-martial may direct.

Pursuant to the provisions of sub-chapters IV and V, U.C.M.J. (10 USCA § 816-829), a General Court martial was duly convened which tried Gosa and on December 2, 1966, found him guilty as charged. A sentence was imposed of forfeiture of all pay and allowances, confinement of hard labor for ten (10) years and a bad conduct discharge (A. 22 R. 29-30). All of the multiple review procedures provided by the U.C.M.J. were accorded.

On July 11, 1967, Gosa petitioned the Court of Military Appeals for a grant of review under Article 67, U.C.M.J., (10 USCA § 867). All direct review procedures were exhausted and Gosa's conviction became final in law on August 16, 1967, when the Court of Military Appeals denied review (A. 26 R. 110).

On August 21, 1969, (A. 1 R. 2), Gosa filed his application for Writ of Habeas Corpus in the United States District Court for the Northern District of Florida and on November 6, 1969, filed in the United States Court of Military Appeals a Motion to Vacate his sentence and conviction. Both the application and the Motion were based on assertions that Gosa's confinement was invalid in light of the decision in *O'Callahan v. Parker*, that the general Court-martial which tried him lacked jurisdiction. The Court of Military Appeals treated the Motion to Vacate as a Petition for Reconsideration, which was denied, *Gosa v. United States*, (19 USCMA 327, 41 C.M.R. 327, (1970) (A. 27). The application for a Writ of Habeas Corpus in the United States District Court

was denied on November 13, 1969. *Gosa v. Mayden,* 305 F. Supp., 1186 (N.D. Fla. 1969). (A. 30).

It was stipulated before the United States Court of Appeals for the Fifth Circuit that the offense allegedly committed did not involve any question of flouting the military authority, the security of the military post or the integrity of military property. There was no connection whatsoever between Gosa's military activities and the alleged crime.

Appeal was taken to the United States Court of Appeals for the Fifth Circuit and on October 12, 1971, the opinion of the United States District Court for the Northern District of Florida, was affirmed and Gosa's application for Writ of Habeas Corpus was denied. *Gosa v. Mayden*, 450 F.2d. 753 (5th Cir. 1971). (A. 35).

ARGUMENT

I.

THE COURT MARTIAL WHICH TRIED GOSA HAD NO JURISDICTION UNDER THE CONSTITUTION OF THE UNITED STATES

A Court-martial is purely a creature of statute and has only such powers as are delegated by statute. There is no presumption of jurisdiction in its favor as exists in Courts of General Jurisdiction. Furthermore, statutory language is construed to conform as near as may be to judicial guarantees that protect the rights of the citizen and Courts will attribute to Congress a purpose to guard jealously against dilution of the liberties of the citizen that would result if the jurisdiction of military tribunals were enlarged at the expense of civil Courts. (*Lee v. Madigan*, 358 U.S. 228, 79 S.Ct., 276, at page 277).

The Fifth Amendment to the Constitution of the United States provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger. . . ."

The question with which we are concerned here is what is meant by and language, "except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger."

As this Court said in *O'Callahan v. Parker*, 89 S.Ct., 1683, 395 U.S. 258:

"If the case does not arise in the land or naval forces, then the accused gets first benefit of an indictment by a grand jury and second, a trial by jury before a civilian Court as guaranteed by the Sixth Amendment and by Art. III § 2, of the Constitution which provides in part:

" 'The Trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the Trial shall be at such place or places as the Congress may by law have directed.'

"Those civil rights are the constitutional stakes in the present litigation. . . ."

"The fact that Courts-martial have no jurisdiction over nonsoldiers, whatever their offense, does not necessarily imply that they have unlimited jurisdiction over soldiers, regardless of the nature of the offenses charged. Nor do the cases of this Court suggest any such interpretation. The Government emphasizes that these decisions—especially Kinsella

v. Singleton—establish that liability to trial by Court-martial is a question of 'status'—"whether the accused in the Court-martial proceeding is a person who can be regarded as falling within the term "land and naval forces." 361 U.S. at 241, 80 S.Ct. at 301. But that is merely the beginning of the inquiry, not its end. "Status" is necessary for jurisdiction; but it does not follow that ascertairment of "status" completes the inquiry, regardless of the nature, time and place of the offense." (89 S.Ct. at pages 1685, 1687 and 1688).

In *O'Callahan*, this Court held, (1) that status of the offender as a person who can be regarded as falling within the terms "land and naval forces" is necessary for jurisdiciton of Courts-martial, but that status dos not in itself subject the offender to such jurisdiction; (2) that to be under military jurisdiction, the crime must be service-connected so that members of the armed services will not be deprived of the benefit of indictment of grand jury and trial by jury of his peers; (3) That the crimes of a soldier who during the peace time and while on evening pass allegedly entered the residential part of a Honolulu Hotel where he broke into a room of a young girl and assaulted and attempted to rape her, were not service-connected and that the soldier cannot properly be tried therefore by court-martial.

This Court in *O'Callahan* finally held:

"We have concluded that the crime to be under military jurisdiction must be service connected, lest cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger,' as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits on [sic] and indictment by a grand jury and a trial by a jury of his peers . . . we

see no way of saying to servicemen and servicewomen in any case the benefits of indictment and of trial by jury, if we conclude that this Petitioner was probably tried by court-martial.

"In the present case petitioner was properly absent from his military base when he committed the crimes with which he is charged. There is no connection—not even the remotest one—between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far flung outposts.

Finally we deal with peacetime offenses, not with authority stemming from the war power, Civil Courts were open. The offenses were committed within our territorial limits not in the occupied zone of a foreign country.

The offenses did not involve any question of a flouting of military authority, the security of a military post, or the integrity of military property.

"We have accordingly decided that since Petitioner's crimes were not service connected, he could not be tried by court-martial but rather was entitled to trial by the civilian Courts." (89 S.Ct. at pages 1690, 1691, 1692.)"

In *Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed., 2d 102 (1971) this Court enumerated twelve factors which, if present, deprive a military court-martial of jurisdiction to try a member of the armed forces otherwise under the jurisdiction of that Court by the mandate of Article 3 U.C.M.J. (10 U.S.C.A. §802).

"1. The servicemen's proper absence from the base.

2. The crime's commission away from the base.

3. Its commission at a place not under military control.

4. Its commission without our territorial limits and not in an occupied zone of a foreign country.

5. Its commission in peacetime and its being unrelative to authority stemming from the war power.

6. The absence of any connecion between the Defendant's military duties and the crime.

7. The victim's not being engaged in the performance of any duty relating to the military.

8. The presence and availability of a civilian Court in which the case can be prosecuted.

9. The absence of any flouting of military post.

10. The absence of any threat of a military post.

11. The absence of any violation of military property."

One might still add other factor implicit in the others:

12. "The offenses's being among those traditionally prosecuted in civilian Courts." 28 L.Ed. at 109.

The total lack of jurisdiction of the Court-martial is clearly demonstrated by the finding of the United States Court of Appeals for the Fifth Circuit in its opinion of *Gosa v. Mayden*:

"Each of these factors is unquestionably present in Gosa's case; indeed the only distinction, locale–the Territory of Hawaii vis-a-vis the State of Wyoming–if effective at all, makes Gosa's case stronger. Indubitably had O'Callahan been rendered prior to the events in Gosa's case, the decision would have deprived the general court-martial which tried Gosa of jurisdictional authority to hear or determine that cause. . . ." 450 F.2d. at 755."

A finding of guilt by a Court having no jurisdiction renders the finding of guilty and the sentence against Gosa, annulity or no force or effect. The Doctrine is well stated in 49 C.J.S. § 401, page 794, we quote:

"***a judgment which is absolutely void is entitled to no authority or respect, and therefore may be impeached at any time, in any proceedings in which it is sought to be enforced or in which its validity is questioned, by anyone with whose rights or interest it conflicts."

II.

PURPOSE-RELIANCE-EFFECT TEST NOT APPLICABLE.

As so clearly stated by Judge Godbold, below, the "purpose-reliance-effect" test of *Stovall v. Denno*, 388 U.S. 293, 87, S.Ct. 1967, 18 L.Ed. 2d. 1199 (1967), "is not a substative end in itself but a tool of sorts. . . ."

Judge Clark, in writing the majority opinion below, grounded the finding of the Court on the effect on the administration of justice of the retro-active application of *O'Callahan*. The sole figure provided by the United States Air Force, at the request of the Court below, was as follows:

"In response to the request for this Court, the Department of the Air Force has advised that its

court-martial systems have processed 475,349 cases since 1949 and although the sheer bulk of analysis prevented a case by case examination, 2-year sampling indicated to the Solicitor General of the United States that 5% would constitute a reasonable working hypothesis of the number of cases that could raise a retroactive *O'Callahan* issue." 450 F.2d. 753 at 766.

Judge Weinstein, in commenting on the Government's position to the impact on the judicial administration stated:

> "It is not clear how many men presently incarcerated are involved, but if they have been deprived of liberty by a body lacking power to do so, they should be released. Much of the administrative burden created by applications for more favorable forms of discharge may be handled by congressional adoption of a short statute of limitations or by administrative remedies." *Flemings v. Chafee*, 330 F. Supp. 193 (E.D.N.Y. 1971)

A. Appeal and Administrative Hearing Results

The most far reaching statistical analysis of the effect on administration of justice by retroactive application of *O'Callahan* is contained in 60 Georgetown Law Journal 551. Blumenfeld, *Retroactivity after O'Callahan: An Analytical and Statistical Approach*, 60 Geo.L.J. 551 (1972). In that article, Mr. Blumenfeld recites statistics to show that at least the present trend would suggest that retroactive application of *O'Callahan* would not adversely effect the administration of Justice. Mr. Blumenfeld cites the following specific examples: *Blumenfeld, supra*, 60 Geo.L.J. at 579-580.

1. Of hundreds of case files in the office of the Defense Appellate Division of the United States Army Judiciary, only 16 presented arguable grounds for seeking relief if *O'Callahan* were retroactive.

2. Of the petitions for relief which had been filed with the Examination and New Trials Division of the United States Army Judiciary, all but four seeking retroactive application have been denied on the grounds that the offenses were service-connected.

3. Records of the Court of Military Appeals reveal that of the 63 petitions for extraordinary relief on the basis of *O'Callahan* received prior to February 1, 1971, 47 concerned service-connected offenses wherein relief has been denied regardless of the retroactivity issue.

4. The number of reversals by the Court of Military Appeals and the Army Court of Military Review on direct appeal indicate that few trials during 1968 and 1969 involve non-service connected crimes. From June 2, 1969, until December 31, 1970, over 4,900 Appellate opinions were filed in cases which were tried before *O'Callahan* was decided. Of that number, the Army Court of Military Review set aside one or more offenses in thirty cases.

B. Civilian-Type Crimes Are On-Post Incidents

Mr. Blumenfield further recites:

"Most civilian-type crimes tried by the military were on-post incidents. For example, 80 percent of all murders committed on a military reservation were tried by Courts-martial; 98 percent of the indecent assaults taking place on post were disposed of by military tribunals; 95 percent of the housebreaking on military post were processed by the services; 93

percent of all on-post larcenies became military cases. It seems that the civilian-type crimes tried by Court-martial a predominant number contain the requisite on post factor."60 Geo. L.J. 551 at 580.

C. Off Post-Civilian-Type Crimes Tried by Civil Courts

As to off-post civilian type crimes committed by servicemen, Mr. Blumenfeld, 60 Geo. L.J. 580 at 551, recites statistics that 80 percent of all off-post civilian type crimes by servicemen, in 1968 were tried in state or federal courts.

The full impact of the foregoing statistics clearly indicates that the great fear of a retrial of 23,767 cases in the Air Force alone, as expressed by Judge Clark below, is totally unfounded on any fact or figure.

D. No Administrative Burden

The other administrative burden falls basically into two categories; First, the review of Court Martial Records and,

Second, the financial ramifications if *O'Callahan* were deemed retroactive.

If *O'Callahan* were applied retroactively, the appropriate remedy for any convicted serviceman would be to seek relief from the military department which imposed the sentence and conviction. Thus the branches of the military could and should establish procedures to handle petitions. A review of the trial record would quickly disclose necessary information as to the location, status, date and offense. Application of *O'Callahan* could be readily determined all but a few cases.

The financial ramifications did not present the burden supposed. Mr. Blumenfeld, 60 Geo. L.J. 551 at 574 points out:

1. Most of the servicemen involved have such short lengths of service that they would not be entitled to any retirement pay or pension.

2. Administrative procedures are already established for the compensation of servicemen where forfeitures have been set aside by Appellate procedures.

3. If the serviceman has not returned to active duty after confinement he has no additional claim except for the amount of money forfeited and compensation for time spent in confinement.

4. In the case of a serviceman returning to duty after confinement at a reduced pay rate, an additional compensation might have to be provided.

Each of the foregoing financial ramifications presents no greater a burden on the military department than the setting aside of a forfeiture of pay after Appellate or administrative review.

The burden on the State and Federal Trial Court system need not materialize. In most instances the examination of the record, without any evidentiary hearing, would be all that is necessary to determine whether or not the conviction and sentence should be set aside on the basis of *O'Callahan*.

E. Chances For Re-Trial in Civil Jurisdiction

Even after a determination that the sentence and conviction should be set aside, there are many factors which might mitigate against the actual retrial of the case in a civil jurisdiction.

1. The statute of limitations may have run.

2. The sentence may have been served.

3. The nature of the crime may be such that the prosecutor may not deem it worthwhile to prosecute.

4. The absence and loss of witnesses due to time.

5. Possible extradition to other jurisdictions.

6. The conduct and behavior of the serviceman indicate that no further prosecution is necessary.

Each of the above factors mitigating retrial become more relevant with the passage of time. Except in the rare instance, the crimes which would come up for review under a retroactive application of *O'Callahan* would have committed prior to 1969. Thus, more than three years has already lapsed which strengthens the above factors mitigating against retrial.

CONCLUSION

It is therefore submitted:

1. That the crime of which Gosa was convicted was not service connected; that the civilian courts of Wyoming were open to prosecute Gosa; and that the court-martial had no jurisdiction;

2. That the doctrine of retroactivity has no application to a case in which the court lacked jurisdiction of the subject matter and therefore the judgment is void;

3. That the rights violated are of such fundamental importance that retroactive application of *O'Callahan* is required;

4. That the holding in *O'Callahan* was not such an abrupt and fundamental change in principle as to constitute an entirely new doctrine, requiring prospective application only; and

5. That there would be no adverse effect on administration of justice;

For the foregoing reasons the opinion below should be reversed and *O'Callahan* should be applied retroactively to comparable proceedings of military courts which reached a stage of complete finality prior to June 2, 1969.

Respectfully submitted,

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